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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 MARK S. DANIELS,

11 Plaintiff,

12 v.

13 FEDERAL BUREAU OF
14 INVESTIGATION, et al.,

15 Defendants.

Case No. 2:08-CV-00615-KJD-GWF

ORDER

16 On September 2, 2009, the Court issued an Order to Show Cause (#14) why the Court should
17 not recommend that Plaintiff's Complaint be dismissed due to failure to effect service upon
18 Defendants. On October 26, 2009, Magistrate Judge George Foley, Jr. issued a Finding and
19 Recommendation (#15), recommending that Plaintiff's Complaint be dismissed with prejudice due to
20 failure to effect service upon Defendants. Pursuant to Local Rule IB 3-2, any objection to the
21 Finding and Recommendation was to be filed by November 6, 2009.

22 On November 10, 2009, Plaintiff filed a Document captioned "Plaintiff's Response to
23 Defendants' Motion to Dismiss 'With Prejudice'" (#16). In said document, Plaintiff mistakenly
24 attempts to respond to the Court's Order to Show Cause and Finding and Recommendation, as
25 though said documents are Motions to Dismiss filed by either Defendants, or the Court. Plaintiff
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1 avers that he has properly effected service upon Defendants pursuant to the Federal Rules of Civil
2 Procedure. The Court disagrees.

3 As pointed out by the Magistrate Judge in the Finding and Recommendation, Plaintiff has
4 failed to meet the standard for service upon the United States and its Agencies, Corporations,
5 Officers, or Employees pursuant to Rule 4(i)(1). Plaintiff argues that service was properly effected
6 pursuant to the Ninth Circuit's ruling in Borzeka v. Heckler, 739 F.2d 444 (9th Cir. 1984). The
7 Court does not agree. In Borzeka, the Ninth Circuit held that failure to comply with the personal
8 service requirement of Rule 4 did not require dismissal if: "(a) the party that had to be served
9 personally received actual notice, (b) the defendant would suffer no prejudice from the defect in
10 service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be
11 severely prejudiced if his complaint were dismissed." Id. at 447. Here, Plaintiff has provided no
12 proof of service attempted upon the United States Attorney's Office, an Assistant United States
13 Attorney, or clerical employee of the United States Attorney's Office in this District. Additionally,
14 Plaintiff fails to demonstrate that any party upon which he has attempted service has personally
15 received actual notice.

16 Accordingly, the Court upholds the Finding and Recommendations of the Magistrate Judge in
17 full, and hereby dismisses Plaintiff's action with prejudice.

18 **IT IS SO ORDERED,**

19 DATED this 13th day of November 2009.



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22 Kent J. Dawson
23 United States District Judge
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